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Nos. 84-921, 84-926 and 84-929

In the Supreme Court of the United States

OCTOBER TERM, 1985

NORTHEASTERN INTERNATIONAL AIRWAYS, INC., AND ARROW AIR, INC., APPELLANTS

v.

FLORIDA DEPARTMENT OF REVENUE

EASTERN AIRLINES INC., APPELLANT

v.

FLORIDA DEPARTMENT OF REVENUE

DELTA AIR LINES, INC., APPELLANT

v.

FLORIDA DEPARTMENT OF REVENUE

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a sales tax imposed by Florida on aviation fuel purchased within that State violates the Interstate Commerce Clause.

2. Whether Florida's scheme of fuel taxation violates the Equal Protection Clause by treating airlines differently in some respects than other carriers.

3. Whether the Florida Supreme Court erred in determining that appellant in No. 84-926 lacks standing under Florida law to challenge the validity of a tax statute governing tax refunds to certain farmers and fishermen.

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

OPINIONS BELOW

The opinion of the Florida Supreme Court in No. 84-921 (J.S. App. 1a-4a) is unreported. The opinion of the Florida Supreme Court in No. 84-926 (J.S. App. 2-14) is reported at 455 So. 2d 311. The opinion of the Florida Supreme Court in No. 84-929 (J.S. App. 1a-12a) is reported at 455 So. 2d 317. The opinions of the Broward County Circuit Court (84-921 J.S. App. 6a-19a) and of the Leon County Circuit Court (84-926 J.S. App. 15-16; 84-929 J.S. App. 25a-37a) are unreported.

JURISDICTION

The judgment of the Florida Supreme Court was entered in each case on June 14, 1984. Timely motions for rehearing were denied in each case on September 12, 1984 (84-921 J.S. App. 20a; 84-926 J.S. App. 33; 84-929 J.S. App. 24a). Notices of appeal in the Florida Supreme Court were filed respectively on December 6, 1984 (84-921 J.S. 11; J.S. App. 80a-81a), on November 28, 1984 (84-926 J.S. App. 34-35), and on October 30, 1984 (84-929 J.S. App. 48a-49a). The jurisdictional statement in No. 84-921 was filed on December 10, 1984, and the jurisdictional statements in Nos. 84-926 and 84-929 were filed on December 11, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2).

STATEMENT

1. Florida for many years has imposed a variety of taxes on different types of fuel purchased within that State. Prior to April 1, 1983, gasoline and diesel fuel were subject to an excise tax at the flat rate of 8¢ per gallon. Fla. Stat. Ann. § 206.01 *et seq.* (West 1971). This tax was paid principally by individual motorists, bus lines, and trucking companies. Other carriers, such as railroads, maritime shipping companies, and airlines, were exempt from this tax. Instead, they paid the general sales tax—technically imposed on the seller for the privilege of doing business in Florida, but required to be passed on to purchasers—at a rate of 5% of the fuel's retail price. *Id.* §§ 212.05, 212.07. The sales tax, as applied to fuel purchased by these carriers, was prorated on a mileage basis. That is, a carrier paid only that portion of the otherwise-payable tax that represented the ratio of its Florida mileage to its total mileage for the previous fiscal year. *Id.* § 212.08(4)

Effective April 1, 1983, Florida amended its fuel tax regime in the following relevant respects:

(a) The scheme governing railroads and maritime shipping companies remained basically the same. They continued to pay the 5% general sales tax on the actual price of the fuel they purchased, and their tax continued to be prorated on a mileage basis.

(b) The scheme governing roadway users was changed considerably. Gasoline and diesel fuel remained subject to the flat excise tax, but the rate was reduced from 8¢ to 4¢ a gallon (84-926 J.S. App. 3). In addition, gasoline and diesel fuel were made subject, for the first time, to the 5% general sales tax (Fla. Stat. Ann. § 212.62 (West Supp. 1985)). Rather than being applied to the actual retail price, however, the 5% levy was applied in the case of gasoline and diesel fuel to an "initially established price" of $1.148 per gallon (*id.* § 212.62(3)(c)). This "initially established price" was to be adjusted for inflation beginning June 1, 1985 (*id.* § 212.62(3)(a)). No provision was made for prorating the sales tax, as applied to gasoline and diesel fuel, on the basis of mileage. See *id.* § 212.08(4). Thus, the aggregate tax burden on these items was effectively increased from 8¢ a gallon to 9.7¢ a gallon.

(c) The scheme governing airlines was also changed considerably. They remained exempt from the flat excise tax, and they remained subject to the 5% general sales tax. However, the method of computing their sales tax liability was assimilated to the newly-established method of computing the sales tax on gasoline and diesel fuel. That is, the 5% rate was applied, not to the actual retail price of jet fuel, but to an "initially established price" of $1.148 per gallon, the same figure used for diesel fuel and gasoline. See Fla. Stat. Ann. §§ 212.02(22), 212.62 (West Supp. 1985). And the mileage proration formula, while remaining in effect for railroads and maritime shipping companies, was re-

pealed in the case of airlines. Compare Fla. Stat. Ann. § 212.08(4) (West 1971) with Fla. Stat. Ann. § 212.08(4) (West Supp. 1985). Finally, a new credit against the State's corporate income tax was created, providing for an offset against that tax equal to one-half the carrier's fuel tax liability, up to a maximum credit of $5 million (*id.* § 220.189). This credit was made available only to air common carriers who had their home office in Florida and who maintained a work force of more than 1,200 employees in the State. *Ibid.;* see 84-929 J.S. App. 2a.

2. Appellants in these three cases are domestic airlines incorporated under the laws of various states and registered to do business in Florida (84-921 J.S. 1, 16; 84-926 J.S. 4; 84-929 J.S. App. 28a). Delta Air Lines, appellant in No. 84-929, has its home office in Georgia (J.S. 8). Northeastern International Airways and Arrow Air, appellants in No. 84-921, have their home offices in Florida but have fewer than 1,200 employees based there (J.S. App. 11a). Eastern Airlines, appellant in No. 84-926, has its home office in Florida and also has more than 1,200 employees based in that State. Appellants are principally engaged in interstate commerce, but also fly on some foreign routes (84-921 J.S. 16; 84-926 J.S. 4; 84-929 J.S. 8).

Appellants brought these actions in Florida trial court, challenging various aspects of the State's fuel tax regime under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Interstate Commerce Clause, and on miscellaneous state-law grounds (84-921 J.S. App. 10a-11a; 84-926 J.S. App. 15-16; 84-929 J.S. App. 25a). The trial courts upheld the statute in all respects (84-921 J.S. App. 18a-19a; 84-926 J.S. App. 15-16; 84-929 J.S. App. 36a-37a). The cases were certified directly to the Florida Supreme Court (84-921 J.S. App. 1a; 84-926 J.S. App. 2; 84-929 J.S. App. 2a), which affirmed in part and reversed in part.

It rejected appellants' federal constitutional challenges to the fuel tax itself (84-921 J.S. App. 1a-4a; 84-926 J.S. App. 2-13; 84-929 J.S. App. 2a, 6a-12a). However, it sustained a challenge, mounted by carriers other than Eastern, to the constitutionality of the income tax credit, holding that the credit "clearly discriminates against interstate commerce because [it] provides a *direct commercial advantage* to Florida-based air common carriers over non-Florida-based carriers" (84-929 J.S. App. 4a, citing *Boston Stock Exchange* v. *State Tax Comm'n,* 429 U.S. 318 (1977) (emphasis in original)). The credit provision was severed from the statute (84-929 J.S. App. 6a, 12a) and the statute as thus modified was sustained. The airlines have appealed the Florida Supreme Court's judgment insofar as it is unfavorable to them; Florida has not cross-appealed as to the constitutionality of the income tax credit.[1]

DISCUSSION

1. Appellants contend that Florida's sales tax on aviation fuel places an unconstitutional burden on interstate commerce, pointing out that the fuel they buy is consumed on interstate flights and that Florida's levy is no

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[1] Florida recently enacted, effective July 1, 1985, further amendments to its scheme of aviation fuel taxation. 1985 Fla. Laws 85-348. The amendments exempt aviation fuel from sales tax, but impose upon it a new excise tax in approximately the same amount. Compare *id.* §§ 2 and 3 with Fla. Stat. Ann. § 212.62 (West Supp. 1985). The invalidated income tax credit is replaced with a provision allowing refund of the new excise tax in an amount "not [to] exceed six-tenths of one percent of the wages paid by the carrier to employees located or based within this state" (1985 Fla. Laws 85-348, § 2 (to be codified at Fla. Stat. § 206.9855)). Enactment of these amendments, which apply only prospectively (*id.* § 9), does not moot the instant appeals, which continue to present a live controversy concerning appellants' sales tax liability from April 1, 1983, to July 1, 1985. We of course intimate no view as to the constitutionality of the 1985 amendments.

longer prorated to reflect that fact. This contention is insubstantial in light of this Court's decision in *Eastern Air Transport, Inc.* v. *South Carolina Tax Comm'n*, 285 U.S. 147 (1932). The Court there upheld a nondiscriminatory, unapportioned sales tax as applied to aviation fuel purchased within South Carolina for use in interstate commerce, reasoning that the taxable event was sale of the fuel and that such sales were "purely intrastate transactions" (285 U.S. at 152). Accord, *United Air Lines, Inc.* v. *Mahin*, 410 U.S. 623, 629 (1973) (rejecting Commerce Clause challenge to state use tax as applied to aviation fuel "withdrawn from storage for consumption in an interstate vehicle"); *Edelman* v. *Boeing Air Transport, Inc.*, 289 U.S. 249, 252 (1933) (same).

Appellants attempt to dismiss these cases as "out-of-date" (84-929 J.S. 13-14) because they were decided under the "direct burden" approach to interstate commerce which this Court abandoned in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). However, the "direct burden" approach was a doctrine that had been used mechanically to *strike down* state laws which, as drafted, technically imposed a levy on "the privilege of doing [an interstate] business" (430 U.S. at 278-279 (original quotation marks omitted)). In repudiating that doctrine, obviously, the Court cast no doubt on the continuing validity (at least as to result) of decisions that had *sustained* state taxes under the old rubric.

In any event, there is no merit to appellants' suggestion (84-921 J.S. 35-36; 84-929 J.S. 10-18) that Florida's tax fails *Complete Auto*'s "fair apportionment" or "fair relation" tests. See 430 U.S. at 279. Because the taxable event—sale of the fuel—takes place wholly within Florida, no other state could undertake to impose a tax on that transaction, and apportionment is thus not constitutionally required. Appellants' contention that Florida's tax is not "fairly related to the services

provided by the State" (*Complete Auto*, 430 U.S. at 279) is based on assertions that the tax is really a user fee, that the proceeds of the tax are devoted to road construction, and that airlines do not derive from Florida's roads a benefit proportional to the tax they pay. See 84-921 J.S. 37-39; 84-929 J.S. 11-17. As the courts below pointed out, however, each of these assertions is erroneous. See 84-921 J.S. App. 11a-12a; 84-929 J.S. App. 7a, 11a, 29a, 34a. The tax is plainly a sales tax because its legal incidence is upon the fuel seller and is imposed for the privilege of selling fuel in Florida. The proceeds of the tax are not devoted to "the construction and maintenance of state roads," as was once true (Fla. Stat. Ann. § 206.46 (West 1971)), but go into a trust fund to "be used for transportation purposes" (Fla. Stat. Ann. § 206.46 (West Supp. 1985)). And appellants do enjoy, not only the benefits of Florida's public transportation network, but also "the benefits of a trained work force and the advantages of a civilized society" (*Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 445 (1979)).[2]

2. Appellants' equal protection challenge is also insubstantial. They contend that Florida's fuel tax regime

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[2] Although appellants appear to engage in foreign as well as interstate commerce (see 84-926 J.S. 4; 84-929 J.S. 8), they did not contend in either court below that Florida's tax as applied to them violates the Foreign Commerce Clause. See, *e.g.*, 84-921 J.S. App. 2a. In a brief filed at the Court's invitation contemporaneously with this one, we express the view that Florida's tax, as applied to aviation fuel purchased by foreign airlines for use exclusively in foreign commerce, is unconstitutional under the Foreign Commerce Clause as interpreted in *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 451 (1979). See 84-902, 84-922 & 84-1041 Br. 30-35. The Court in *Japan Line* specifically declined to reach "questions as to the taxability * * * of domestically owned instrumentalities engaged in foreign commerce" (441 U.S. at 444 n.7). Since appellants did not raise this question below and consequently do not present it for review here, we have no occasion to address it.

places a heavier burden on airlines than on railroads and maritime shipping companies, since the latter (a) have their sales tax reduced by application of a mileage proration formula, a benefit airlines no longer enjoy, and (b) pay tax based on the actual price of their fuel, rather than (as is true for airlines) on an "initially established price" of $1.148 per gallon (84-921 J.S. 29-34; 84-926 J.S. 5-6; 84-929 J.S. 18-22). And appellants contend that Florida's fuel tax regime places a heavier burden on airlines than on trucking companies, even though both pay sales tax at 5% of an "initially established price" of $1.148 per gallon without mileage proration, since the market price of jet fuel during the relevant period was lower than that of diesel fuel and gasoline (84-921 J.S. 32-33; 84-929 J.S. 7 & n.4, 17). In appellants' view, the Equal Protection Clause requires that all carriers be treated identically.

It was long ago established that "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Madden* v. *Kentucky*, 309 U.S. 83, 88 (1940). "The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." An equal protection challenge can prevail "only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes." *Ibid.* Accord, *e.g.*, *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 359-365 (1973) (citing cases).

The courts below correctly concluded that appellants "failed to demonstrate that a hostile and oppressive discrimination has been made" (84-926 J.S. App. 5). Florida's fuel tax regime, as revised effective April 1, 1983, does appear to impose a heavier burden on airlines than on other carriers, although the differential burden depends in part on the relative market prices of

various fuels, whose fluctuations are of course beyond the Florida Legislature's control. Florida's overall tax system, however, treats airlines more favorably in other respects. See 84-921 J.S. App. 13a-14a; 84-929 J.S. App. 31a. The State, moreover, cannot be said to have lacked a rational basis for repealing the mileage proration formula in the case of interstate air carriers, since "proration of mileage for aircraft has proven difficult in the past because of flight patterns over the Gulf of Mexico and Atlantic Ocean to avoid accumulation of intrastate mileage" (84-929 J.S. App. 31a). Although state taxes are not altogether immune from equal protection scrutiny (see *Metropolitan Life Ins. Co.* v. *Ward,* No. 83-1274 (Mar. 26, 1985)), the tax regime challenged here, relieved of the income-tax-credit provision struck down by the Florida Supreme Court, neither discriminates against out-of-state competitors nor lacks a rational relationship to Florida's legitimate purpose of raising money for public transportation.

3. Appellant in No. 84-926 challenges the holding that it lacks standing to contest the constitutionality of provisions governing fuel tax refunds to certain fishermen and farmers (J.S. iv, 4-5). Appellant did not allege that it competed, directly or indirectly, with farmers or fishermen (84-926 J.S. App. 11), and the Florida Supreme Court accordingly denied it standing to raise this challenge, reasoning that "the constitutionality of * * * a statute cannot be tested by a party whose rights or duties are not affected by it" (*id.* at 11-12). In so ruling, the court relied exclusively on Florida law. See *id.* at 11-13. In any event, its ruling is fully consistent with this Court's decisions. See *Allen* v. *Wright,* No. 81-757 (July 3, 1984).

CONCLUSION

The appeals should be dismissed for want of a substantial federal question.

Respectfully submitted.

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